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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 195

No. 781

MRS. WANDA MERCER, Petitioner,

versus

PARIS THERIOT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MRS. WANDA MERCER, Petitioner,

versus

PARIS THERIOT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. Wanda Mercer, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW.

No opinion of the District Court in *Mercer v. Theriot*, was written; the opinion of the Fifth Circuit Court of Appeals in this case (Appendix "A", *infra*, pp. 53-65) is reported at .... F. (2d) .....

JURISDICTION.

The judgment of the Fifth Circuit Court of Appeals in *Theriot v. Mercer*, (No. 17,214) was entered on January 23, 1959. (Appendix "B", *infra*, pp. 66-67). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED.

1. Whether the Fifth Circuit Court of Appeals can deny petitioner a fair hearing.
2. Whether the Fifth Circuit Court of Appeals can reverse a jury verdict and judgment of the District Court on the basis of the trial getting out of bounds due to the inattention of the trial judge and for inadmissible inflammatory trial tactics used by petitioner's counsel, when no such inattention and such inadmissible inflammatory tactics are shown by the record.
3. Whether the Fifth Circuit Court of Appeals can reverse a jury verdict and judgment of the District Court for errors not objected to by defendant, either during the trial or orally or in brief on appeal, which errors can not be shown to have been prejudicial to defendant.
4. Whether the Fifth Circuit Court of Appeals can reverse a jury verdict and judgment of the District Court for insufficient evidence by refusing to take cognizance of apposite decisions of other Circuit Courts of Appeals and of this Honorable Court.

5. Whether the Fifth Circuit Court of Appeals in weighing the evidence to test its sufficiency, can ignore certain valid, probative evidence properly admitted for the jury's consideration.

6. Whether the Fifth Circuit Court of Appeals can invade the jury's function and re-try issues of fact and credibility of witnesses, and substitute its judgment in these particulars.

STATUTES INVOLVED.

1. Constitution of the United States, Amendment Seven.

STATEMENT.

Petitioner, Wanda Lane Mercer, and Byrd Mercer were married on May 5, 1948, and continued to reside as husband and wife up to the time of his death on December 18, 1955. At the time of his death Byrd Mercer was employed in construction work, laying a pipeline in the Gulf of Mexico, and was living with petitioner in a trailer court on Grand Isle, in the State of Louisiana, approximately four miles east of the docks where Mercer caught the boat which transported him to the job.

After arriving at the dock after work on the evening of December 18, 1955, Mercer told Miller, a co-employee with whom he usually rode home, that he did not want to wait, and left; at this time, about 7:00 P. M., Mercer was last seen alive.

Paris Theriot, the defendant, had homes in Golden Meadow, Louisiana, as well as on Grand Isle, and in December of 1955, was living in his Golden Meadow home. Theriot, in partnership with his brother, Leo Theriot, owned an automobile agency selling Oldsmobiles and Chevrolets. The defendant went to Grand Isle on Sunday, December 18, 1955, for the stated purpose of selling an Oldsmobile to Leo Terrebonne; he was driving a 1955 Oldsmobile painted white in front and red in back. Theriot made a deal with Leo Terrebonne to sell him an automobile and then spent the afternoon in a tavern known as Fisherman's Bar in Grande Isle; he admitted consuming four or five drinks of Scotch and water (R. 56), but the bartender, Louis Bradberry, stated he served Theriot ten or fifteen Scotch and water drinks (R. 157).

About 7:30 P. M., the defendant left Grand Isle to return to his home in Golden Meadow traveling over Louisiana Highway 1, which is the only road on Grand Isle, going in an easterly direction. The weather was foggy and rainy.

Around 7:00 or 7:30 A. M., on Monday, December 19, 1955, petitioner was informed that her husband had been found dead on the right shoulder of Highway 1, on Grand Isle. The Coroner's certificate, introduced in evidence, marked Plaintiff Exhibit 2, shows that Mercer died on Grand Isle Road No. 1, about 7:30 P. M. December 18, near the Humble Oil Camp, and was thirty-two years of age, white; the final diagnosis as shown on the autopsy report of the pathologist, all as shown on Plaintiff's Exhibits 3, 3-A, 3-B and 4, indicated that the deceased died from fracture dislocation of the antlantoocipital joint with traumatic contusional spinal

cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of the skull; rupture of the spleen, liver and both renal arteries, laceration of scalp, face, right thigh, right hand and left leg.

Deputy Sheriffs Gautreaux and Prudhomme identified the body and conducted the investigation in conjunction with Officer Folse. Gautreaux, called to the scene at approximately 6:30 A. M., on December 19, 1955, made several photographs while the body was still in the position where it had been found. These pictures showed the body was on the right shoulder of the highway face down, some three feet from the blacktop portion of the road. Distinct tire marks leading up to the body and beyond it indicated Mercer had been run over while on the shoulder of the road; blood was found in the tire tracks. Mercer was wearing blue denim clothes, had had a lunch pail which was found on the side of the road near his body.

The investigating officers proceeded to Golden Meadow, where they gave Theriot's car a careful examination, Deputy Sheriff Gautreaux making several pictures of the automobile, introduced in evidence as Plaintiff's Exhibits 7 through 13. These photographs, together with the testimony of the officers, revealed that Theriot's car was damaged; the right front fender was dented, the rim of the headlight missing, and there was a large indentation on the hood of the automobile. Scrapings were taken by these officers of a spot of blue, which appeared to be a dye stain, and also of a white substance, taken from the indented section, which appeared to be soap powder, in a film left on the surface of the car; as well as a hair-like substance taken from the right front axle. Former Deputy

Sheriff Guidry found a towel in the car between the back seat and the seat cover, with dark brownish spots appearing to be blood. This evidence along with the lunch pail, clothing and other articles were brought to the Sheriff's office whence they were to be sent to the Department of Public Safety's laboratory in Baton Rouge.

Deputy Prudhomme requested permission to bring this evidence to Baton Rouge, but was refused. The evidence, along with Prudhomme's notes were found to have been tampered with, and then subsequently disappeared. Several inquiries were made by Deputy Millet and Officer Folse regarding the disappearance of the evidence, all to no avail. Trooper Folse said that this evidence and the investigation made would furnish definite proof as to the identity of the driver responsible for Mercer's death (R. 226). Trooper Folse further testified that he heard there had been a pay-off in the case (R. 229-233). Deputy Sheriff Millet testified that he had been fired as a result of the case.

Paris Theriot gave conflicting explanations as to the cause of the damage to his automobile. He told Deputy Millet and former Deputy Guidry that he had hit a cow with his car the day before. He also told Trooper Folse and Deputy Prudhomme that he had collided with a truck which was proceeding in the same direction in which he was going, in which he ran off the road for some 150-200 feet and then pulled back onto the road. The officers investigating the side of the highway saw no such markings. Trooper Folse testified that there was some evidence that a car had run off the highway but at that spot, the mud was so thick and wet that the only way the vehicle

could have gotten back on the road was for it to have been pulled out. (R. 226). An examination of the photograph of defendant's car shows the damage was made by a soft object and could not have been made by striking the rear of a stake body truck and a piece of timber flying out of the truck and landing on the hood, as Theriot maintained.

It was shown that Paris Theriot sold his interest in the automobile agency business to his brother, effective December 31, 1955, subsequent to the date of this accident, and also that Theriot endorsed a note for one of his witnesses, Leo Terrebonne, in the amount of $20,000.00. Under Rule 43(b) of the Federal Rules of Civil Procedure, the deposition of the defendant was offered in evidence out of the presence of the jury; which deposition shows that Theriot admitted running over two other individuals. This evidence was ruled inadmissible by the trial judge who stated that if such evidence came out even without any prompting from any witness, the Court would immediately order a mistrial, and the excluded evidence was admitted for the record.

The jury returned a verdict for petitioner in the amount of $25,000.00, and judgment was entered on October 25, 1957, in conformity with the verdict. The Fifth Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with directions to enter a verdict for the defendant, "* * * unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." (Appendix "A", p. 65).

REASONS FOR GRANTING THE WRIT.

After a trial in the district court, in which both plaintiff and defendant's cases were presented fairly to the jury, presided over by an impartial, highly competent trial judge, a jury verdict was rendered in petitioner's favor. The Court of Appeals for the Fifth Circuit, through Judge Hutcheson, reversed this judgment, apparently on two grounds: (1) The trial went out of bounds due to laxity and error on the part of the trial judge, and the manner in which petitioner's counsel pleaded his case; (2) There was insufficient evidence to sustain the verdict.

We say apparently, for the rationale in law is most difficult to ascertain from the text of the opinion, since for the most part it is concerned with a most vehement castigation of the trial judge and petitioner's attorney, based on "errors" neither assigned by defendant nor substantiated by any portion of the record.[1] In the remainder of the opinion, in discussing the issue of sufficiency of evidence, the Fifth Circuit Court of Appeals repudiated the decisions of other Circuit Courts of Appeals as well as this Honorable Court, upon which petitioner relied as the prevailing law, declaring that they would not be accepted in these words: "Not in the Fifth Circuit while this court sits." (See Appendix "A", p. 62).

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[1] Making it necessary to advert to this Honorable Court's modus operandi described to-wit: "At times, the atmosphere in which the opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests." Black v. Cutter Laboratories, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188.

In view of the fact that the Court of Appeals' opinion does not rest on any grounds recognized and authorized by the existing jurisprudence or legislative enactments, and moreover indicates an arbitrary, biased position taken against petitioner, petitioner was unjustifiably deprived of a fair hearing, to which she is entitled under the law of the land. To the end of rectifying this error, and reaffirming the right of all litigants a truly impartial hearing before the appellate tribunal, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

I.

THE TRIAL DID NOT GO OUT OF BOUNDS.

A.

The Trial Judge Did Not Commit Errors During Trial.

1.

General Conduct of the Trial.

Footnotes 2, 3 and 4 deleted.

Since defendant did not argue that the trial went out of bounds, and in addition, his contention that inadmissible evidence was heard by the jury at the times cited in his brief is negatived by the record, it must be concluded that no error was assigned in the District Court, nor was the point presented for review as error to the Fifth Circuit Court of Appeals.

Nevertheless, the Court of Appeals reversed the jury verdict citing as authority, *Maryland Casualty Co. v. Reid*, 5 Cir., (1935), 76 F. (2d) 30:

> "'* * * the Appellate court may, though no objection is made and no exception taken, correct an error of abdication, which has resulted unjustly, by voiding the trial. But this will be done only in extreme cases, where the judge's error in permitting the trial to get out of bounds, instead of exercising his function to guide and control it, **is of such transcendent influence on the course of the trial as that**, though not excepted to, justice requires its being noticed and corrected. * * *' pp. 32-33. (Emphasis supplied)." [5]

Appendix "A", p. 56.

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[5] **Maryland Casualty Co. v. Reid, supra,** involved a plea by defendant to reverse a jury verdict below, assigning error in the trial getting out of bounds. This plea having been refused by the appellate court, the language quoted is not more than dictum; further the fact that defendant in that case did assign this error on appeal distinguishes it from the instant case, where no such assignment was made.

In order to apply the *dictum* of the *Maryland Casualty* case, the Fifth Circuit Court of Appeals sought to point out wherein the instant case could be designated such "extreme case", by means of the following description of the trial:

> "This case at once precisely illustrates and perfectly proves the truth and wisdom of what was there said. Originating in and bolstered by an atmosphere of rumor and intrigue, heard on inadmissible and inflammatory evidence and presented to the jury with the use of trial tactics equally inadmissible and inflammatory, which except in one glaring instance [6] went unrebuked and unrestrained, the case was tried in a melodramatic atmosphere and setting of suspicion and prejudice in and by which trifles light as air were made to seem confirmations strong as proofs of Holy Writ. Thus tried, it was submitted to the jury on a record so replete with instances of things done which ought not to have been done and of things left undone which ought to have been done as to require the holding here that defendant was deprived thereby of that fair trial to which, in a federal court at least, every person accused of fault is by law entitled."

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[6] Reference is made to petitioner's proffer in evidence of admissions contained in defendant's deposition that he had struck and killed two persons with his automobile. The trial judge ruled such evidence inadmissible and if such evidence came out even without any prompting from any witness, a mistrial would be declared immediately. No rebuke or restraint was necessary as petitioner immediately submitted to this ruling; neither could the jury have been inflamed since it had retired. (R. 255-256).

This portion of the opinion is found at page 56 Appendix A.

Attempting to show that the trial judge had committed many errors resulting in his failure to guide and control the trial, the Court of Appeals' opinion continues.

> "* * * due to the inaction of the trial judge, the trial went out of bounds as a trial to become a hue and cry."
>
> Appendix "A", page 57.

The Fifth Circuit Court of Appeals has held that the trial was conducted in an atmosphere of rumor and intrigue in which inflammatory and admissible evidence was presented to the jury, yet we fail to see how this impression could have been obtained from, or be substantiated by a reading of the record. Such highly-colored statements, swathed in bewildering generalities, alluding to no specific events in the trial appear somewhat incongruous with that measured, judicious, review of the record attendant upon the discharge of the duties of a federal appellate tribunal.

The error of inattention,[7] laid to the trial judge, finds no foundation in the record, which reveals that defendant's objections were sustained in all instances

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[7] It is regrettable that the Fifth Circuit Court of Appeals, without basis from the record, should label proceedings in a federal district court as a hue and cry. Especially does this seem unmerited since the trial was presided over by a federal judge whose outstanding attention to his duties has educed commendation by Mr. Chief Justice Warren, in an address to the American Bar Association, at its opening meeting on August 25, 1958. See "The Problem of Delay: A Task for Bench and Bar Alike," American Bar Association Journal, 1958, Vol. 44, Number 11, pp. 1043, 1045.

where registered: (R. pp. 32, 33, 36, 40, 41, 44, 89, 95, 108, 110, 117, 137, 139, 151, 155). More importantly, **on numerous occasions the court interceded to suppress testimony from a witness during his questioning by petitioner's counsel, as being speculative, hearsay or opinion of the witness, without defendant's counsel first making an objection:** (R. pp. 35, 87, 88, 90, 91, 145). This being true, it is submitted that through the vigilance of the trial judge, the defendant was unquestionably afforded a fair trial and was protected from any prejudice arising out of inadmissible evidence getting to the jury, as the sustaining and supplying of objections for defendant excluded such evidence.

In view of the foregoing, the instant case can not be assimilated to the "extreme cases" referred to in the *Maryland Casualty* case, and therefore, the Fifth Circuit Court of Appeals was without authority to reverse the jury verdict in favor of petitioner.

2.

The Trial Judge Did Not Err in Allowing Hearsay Evidence To Be Introduced.

Commenting upon the trial judge's dereliction from duty, the Court of Appeals gives this illustration:

> "Without undertaking to point them all out, it is sufficient to say that one of the most grievous of them was the court's permitting a witness to be asked whether there had been a pay-off in the case and to answer that he had heard that there was."
>
> Appendix "A", pp. 57-58.

We do not understand how this could be estimed an error on the part of the trial judge since no objection was made by defendant to this question at the time.[3] Further, that no substantial injustice was done thereby to defendant, necessitating the Fifth Circuit Court of Appeals noting such error, is shown by the following facts not mentioned in the opinion:

This witness, under cross-examination by petitioner's counsel, was asked a long series of questions concerning the tampering with, and eventual disappearance of the evidence in the case at bar, which were unobjected to by defendant's counsel (R. pp. 228-229); this question regarding a pay-off was intended to elicit some explanation as to the disappearance of such evidence. But of paramount importance is the fact that far from objecting to this question, defendant's counsel repeated this question to the witness on re-direct thus:

"Q. Mr. Folse, who told you there had been a pay-off in this case?
A. Trooper Milliet." (R. p. 233).

What reason defendant's counsel had in emphasizing this point by repetition, no one can tell save counsel himself. Doubtless he had some valid motive for doing so, and his competency should not only be presumed, but his judgment respected. It is submitted that the Fifth Circuit Court of Appeals cannot now, acting either as defendant's advocate or alter-ego, rescind this redirect examination without counsel's request or even his consent.

[3] See note 2 supra.

The end result, the Court of Appeals concludes, of petitioner's counsel posing this question relative to the pay-off, was to "* * * deprive the defendant of a fair trial on the charge of negligence made out but not proven".[9] Such a position is untenable, for according to this line of reasoning, it would be more logical to say defendant was deprived of a fair trial by the action of his own counsel, first, in failing to object, and second, in posing the identical question on redirect so that the answer was reiterated for the jury. If indeed this question was so injurious to defendant as to be viewed as sufficient to cause a mistrial by the Court of Appeals, (see Appendix "A", p. 58), it would seem its repetition, more firmly embedding the response on the consciousness of the jurors, would be even more prejudicial. In effect the Court of Appeals is holding that the trial judge must substitute his judgment for that of defendant's counsel, in derogation of his function as a judge, and supply an objection as well as restrain defendant's counsel from repeating the question; should the trial judge not do so, as here, the appellate court will stand in the shoes of counsel and provide the necessary objection, and annul the repetition of the question.

Because of the lack of objection by the defendant, and there being no substantial injustice shown, this hearsay evidence was worthy of consideration by the jury, and could not be disregarded by the Fifth Circuit Court of Appeals. These principles are set forth in the case of *Gibson v. Elgin, Joliet & Eastern Railway Company*, 7 Cir., (1957), 246 F. (2d) 834, thus:

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[9] Appendix A, p. 58.

"Marjanian's testimony as to what the plaintiff told him was undoubtedly hearsay but it was not objected to and no motion to strike was made. The court is of the opinion that no basis was laid for the receipt of that testimony as res gestae. However, the rule with reference to hearsay testimony received without objection is that it is to be considered and given its natural probative effect.

"In Wigmore on Evidence, Sec. 18, the author quotes Diaz v. United States, (1911), 223 U. S. 442, 450, 32 S. Ct. 250, 56 L. Ed. 500:

> " 'So of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible.'

"Spiller v. Atchison, T. & S. F. Ry. Co., (1919), 253 U. S. 117, 131, 40 S. Ct. 466, 64 L. Ed. 810; The Sac and Fox Indians, (1910), 220 U. S. 481, 31 S. Ct. 473, 55 L. Ed. 552.

"Wigmore further adds that failure to make an objection is an implied waiver; that once admitted, the evidence is in the case for what it is worth.

> "'Hearsay evidence admitted without objection may be regarded as sufficient to establish a fact in controversy.'

"20 American Jurisprudence, Evidence, Sec. 1185:

> "• • • hearsay evidence, in the absence of objections to is admission, was properly considered by the jury, • • • that the weight to be given such

testimony in view of the attempt made to discredit it was also a question for the jury, * * * and that it should not be disregarded by the Court on this review, * * *.'

"Byars v. United States, 6 Cir., (1956), 238 F. (2d) 82, 83."

Gibson v. Elgin, Joliet & Eastern Railway Company, supra, at page 836.

It has long been recognized that where there has been no proper objection made, the admissibility of evidence is not reviewable by the appellate court. See *Simpson v. Standard Oil Co. (N. J.)*, 2 Cir., (1955), 223 F. (2d) 306; *United States v. Sytch*, 3 Cir., (1958), 257 F. (2d) 475; *Boyle v. Bond*, App. D. C., (1950), 187 F. (2d) 362; *Richardson v. Richardson*, App. D. C., (1940), 112 F. (2d) 19; *Arizona Power Corp. v. Smith*, 9 Cir., (1941), 119 F. (2d) 888. Even had defendant objected, he must show wherein he was prejudiced by the introduction of such evidence.[10]

Hence we have a situation in which defendant did not make an objection in the District Court, and therefore waived it under the *Gibson* case; further, defendant did

[10] Railway Express Agency v. Epperson, 8 Cir., 1957, 240 F. (2d) 189, states the rule at pp. 193-194:

"The reports were, we think probably not admissible. Affronti v. U. S., 8 Cir., 145 F. (2d) 3, 7-8; Ryan v. U. S. Parcel Service, 2 Cir., 205 F. (2d) 262; U. S. v. Grunewald, 2 Cir., 233 F. (2d) 556, 566; but what of it. The defendant who has the burden of demonstrating prejudice, as well as error, Palmer v. Hoffman, 318 U. S. 109, 116, 63 S. Ct. 477, 87 L. Ed. 645, has failed to show that it was hurt by the statements. See Rule 61, Federal Rules of Civil Procedure; Valley Shoe Corp. v. Stout, 8 Cir., 98 F. (2d) 514, 520; Thorp v. American Aviation & General Ins. Co., 3 Cir., 212 F. (2d) 821, 827."

not even assign such admission of evidence as error and demonstrate wherein he was prejudiced thereby orally or in brief to the Fifth Circuit Court of Appeals. In consideration of this, and the additional fact that defendant's repetition of the question precludes such "error" from being classified as one described in the *Maryland Casualty* case—"* * * of such transcendent influence on the course of the trial as that though not excepted to, justice requires its being noticed and corrected * * *" such assignment of error was improper.

3.

The Trial Judge Did Not Err in Charging the Jury.

The "further and highly prejudicial error of charging the jury" cited in the opinion, quotes the objectionable charge as follows:

> "The testimony of all of the witnesses for the plaintiff has made out what we call in law a circumstantial case, and you will consider the evidence in the light of these circumstances as they have been adduced from the witness stand." (See Appendix "A", page 60).

Exception was taken to this portion of the charge after the jury retired; the trial judge requested the stenographer's notes be read, recalled the jury immediately and reinstructed them, and the defendant made no objection to such reinstruction.

The Court of Appeals felt that this was but one more example of inattention on the part of the trial judge; however, we believe that the true facts will reveal

that the necessity for reinstruction arose out of defendant's tardiness in registering an objection. The record shows that after the general charge was given that the trial judge called counsel to the bench, at which time he asked them for their objections to the general charge (R. pp. 290-291). Both counsel agreed that they did not have objection to any part of the general charge, but defendant's counsel requested an opportunity to register his exception to the trial judge's refusal of the charges he submitted, out of the presence of the jury; whereupon counsel for petitioner made a similar request for the protection of the record. The jury was retired, and when the trial judge asked for the above described exceptions, defendant, having thought better of his agreement not to object to the general charge, made an objection to the portion of the charge quoted above. The trial judge, without delay, had the stenographer's notes read, which accounted for the lapse of time from 12:35 until 1:00 when the jury re-entered the court room, and reinstructed the jurors. In no manner can the necessity of recalling the jury be said to result from the inattention of the trial judge, for had the defendant registered his objection when such was solicited by the trial judge in conference with counsel, the jury could have been reinstructed without ever leaving the room.

In any event, it is submitted that the Court of Appeal cannot term this charge erroneous for two reasons: First, viewing the charge as a whole, and not merely lifting one sentenc out of its context, as was done here, it cannot be said that this charge was prejudicial to the defendant, or that it in anywise misled the jury by incorrectly stating the apposite law when read

in its entirety. The record shows that the trial judge made the above quoted statement on page 282 of the record; however, the judge went on to explain in detail exactly what he meant by "The plaintiff has made out what we call in law a circumstantial case" thus:

> "You must remember, when you were empaneled as a jury you were told that circumstantial evidence is to be received with caution. It is to be weighed very carefully, but circumstantial evidence is good evidence and when it shows by a preponderance of all of the evidence in the case the truth of a particular fact, then you must accept that fact. You must consider what other reasonable hypotheses there may be, and if this circumstantial evidence negatives the reasonable existence of such hypotheses, then you must accept the fact which this circumstantial evidence indicates. That is the case for the plaintiff." (R. pp. 282-283).

From a reading of the portion of the charge objected to, together with that immediately following it, it is not to be disputed that the trial judge gave an adequate description of the case and character of the evidence adduced and the law applicable thereto. Any ambiguity contained in the sentence directly preceding, which was seized upon by defendant's counsel as misleading, was in any event fully clarified by the explanation contained in the above quoted paragraph.

The rule in this connection is that the correctness of a charge will be judged by a reading of the whole and not by lifting one statement out of context. *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 8 Cir., (1948),

165 F. (2d) 473; *Goodyear Fabric Corp. v. Hirss*, 1 Cir., (1948), 169 F. (2d) 115; *Sutton v. Public Service Interstate Transp. Co.*, 2 Cir., (1946), 157 F. (2d) 947, certiorari denied, 330 U. S. 828, 91 L. Ed. 1277, 67 S. Ct. 670; *Schutte & Koerting Co. v. Fisher*, D. C. Pa. (1944), 4 F. R. D. 11; *Affleck v. Chicago and Northwestern Railway Co.*, 7 Cir., (1958), 253 F. (2d) 249. See also *Capital Traction Co. v. Wathen*, 35 App. D. C. 577, wherein the appellate court held:

> "A judgment will not be reversed because a special instruction granted on behalf of plaintiff was not sufficiently specific where charge to the jury supplemented and made plain the point mentioned in the instruction."
>
> *Capital Traction Co. v. Wathen, supra*, at page 581.

Also the trial judge's charge was in conformity with the prevailing jurisprudence concerning circumstantial evidence. In *Harms, Inc., v. Sansom House Enterprises, Inc.*, (1958), 162 F. Supp. 129 at page 136, appears this language:

> "In this civil case, plaintiffs were of course not required to establish their case beyond a reasonable doubt, but merely by a preponderance of the evidence. It was not plaintiffs' burden to prove their case beyond every possible contrary hypothesis."

Similarly, in *Hopkins v. E. I. Du Pont De Nemours & Co.*, 3 Cir., (1952), 199 F. (2d) 930, citing *Williams v. Reading Co.*, 3 Cir., (1949), 175 F. (2d) 32, 34, the court held:

"It is not the rule that circumstantial evidence need exclude everything which the ingenuity of counsel may suggest as having possibly caused the death."

Hopkins v. E. I. Du Pont De Nemours & Co., supra, at p. 934.

See also *Hartford Fire Ins. Co. v. Thompson*, 8 Cir., (1949), 175 F. (2d) 10.

Secondly, we do not believe that the trial judge can be deemed guilty of error in charging the jury since he corrected any impression contrary to the jurisprudence and detrimental to the defendant which might have been received by the jury, by reinstructions immediately after defendant objected and the stenographer's notes were read, reading as follows:

"THE COURT:

"That is sufficient. The part I want to refer to immediately is the part which says that the testimony of the witnesses for the plaintiff has made out what we call in law a circumstantial case. What I meant to say was that the witnesses for the plaintiff and the plaintiff herself have sought to make out through her evidence, and through their evidence a circumstantial case. The question as to whether or not the case of the plaintiff has been proved is for the jury to determine. In other words, I did not mean to indicate at all at this time in the charge, or at anytime in the charge that it was the Court's view that a circumstantial case had been made out by the

plaintiff. It is up to the jury to determine specifically whether or not the case has been proved as alleged, and as explained to you by the Court in its instructions." (R. p. 294).

O'Boyle v. Northwestern Fire & Marine Ins. Co., 2 Cir., (1931), 49 F. (2d) 713, involved an erroneous instruction subsequently corrected when the jury was called back into the court room. The trial judge charged the jury that the burden of showing unseaworthiness rested on the defendant, to which the defendant objected. The jury was recalled into the court room and the court called its attention to the policy provision under which the defendant would not have the burden of proving the loss was caused by unseaworthiness. The Court of Appeals held that this was not error:

> **"In this way any previous error in that regard was cured** and the defendant now has nothing of which it can justly complain on that score." (Emphasis supplied).
>
> *O'Boyle v. Northwestern Fire & Marine Ins. Co., supra*, at p. 716.

Another case dealing with the same point is *Baker v. United States*, 5 Cir., (1946), 156 F. (2d) 386, in which the defendant was charged with using the mails to defraud and assigned as error the court's reinstructing the jury after it had retired to deliberate. Judge Hutcheson refused this contention in these words:

> "It is universally held that when an error has been committed and later is corrected in a formal ruling of the court, it may not be assigned unless

it is made clearly to appear that the situation was such that the correction did not remove the effects of the error complained of. (7) Appellants argue that this is such a case: that the jury having been allowed to go out without being properly instructed and having deliberated for many hours, no doubt discussing the failure of the defendants to testify, it was too late to do any good to instruct them in the matter just before they brought in the verdict. **On the other hand, it may be more cogently argued that if when the jury came in for instructions, they had not made up their minds but were still undecided, this charge given at defendants' request might well have been of greatest value to them, indeed of far more value than if given as a part of the general charge.** But these are speculations. **The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done. Where, as here, the error has been openly confessed and deliberately corrected with no complaint of or exceptions to the manner or substance of the correction made at the time, the original failure to give the charge certainly cannot be held reversible error. * * *"**

Baker v. United States, supra, at pp. 390-391.

Petitioner maintains that the charge as objected to was not erroneous, and moreover, since no objection was made to the reinstruction by defendant, the reinstruction cannot be regarded as having done substantial injustice to the defendant, calling for intervention by

the Fifth Circuit Court of Appeals; and in view of the *Baker* and *O'Boyle* decisions, there can be no assignment of error.

4.

The Trial Judge Did Not Err in Denying Defendant's Motion for Directed Verdict and in the Alternative for a New Trial.

Defendant's motion for directed verdict was denied, the trial judge giving as his reasons for judgment:

> "Reasons: No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to." (R. p. 302).

The Court of Appeals observes that this statement proves too little or too much",[11] and through the use of semantic legerdemain, concludes that the trial judge actually meant to say "• • • that in the atmosphere generated in and by the trial, no other verdict could reasonably have been expected from the jury".[12] A directed verdict for the defendant should have been entered, according to the appellate court.

Petitioner takes exception to this interpretation given by the Court of Appeals, for certainly the distinguished trial judge is entitled to the presumption that he recognized his function was to preside impartially over the trial, and there can be no doubt that he did so from the record, as has been discussed above. It

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[11] Appendix A, p. 62.
[12] Appendix A, p. 62.

cannot be gainsaid that the trial judge was rightfully convinced that the trial had been properly conducted and that justice had been done to both sides. How then, could he, through the above quoted reasons, tacitly admit that instead, he had allowed the trial to be presented in an atmosphere of "rumor and intrigue", without correcting such errors, in which the jury would be so strongly influenced to return a verdict that such a verdict would be the only logical outcome of the trial? This is the construction of the Court of Appeals, yet it is inescapable that Judge Wright's straightforward statement can only be read as an expression of agreement with the verdict rendered, especially emphasizing the impression of truthful testimony given by petitioner's witnesses, and of inconsistent, false testimony given by defendant and his witnesses, glaringly apparent to one present at the trial but perhaps not so readily discernible to one reviewing the cold record.

It is unfortunate that there is no method by which the trial judge may respond to erroneous, unwarranted assumptions of the Fifth Circuit Court of Appeals. Certainly he is in a position to refute such comments dealing with the atmosphere prevailing during the trial—that it bore no resemblance to one in which there was a "* * * cloak and dagger aspect of political intrigue and scandal, and the real issue, whether the defendant's car had struck the deceased and whether, if so, the defendant was negligent, was lost to view, indeed disappeared from the case."[13] In addition, the trial judge could most assuredly reaffirm the meaning of his reasons for judgment, which were so tortuously misconstrued by the Fifth Circuit Court of Ap-

[13] Appendix A, p. 58.

peals. Lacking this opportunity to defend his position, and the Fifth Circuit Court of Appeals having arbitrarily discounted all indications from the record that a fair trial was held, the sole recourse available is petitioner's prayer that this Honorable Court reinstate the verdict approved by his judgment.

B.

Petitioner's Counsel Did Not Use Inadmissible and Inflammatory Trial Tactics.

The Court of Appeals held that petitioner's counsel's opening statement and closing argument were highly improper, denoting another instance wherein the trial went out of bounds. The attack on petitioner's counsel is commenced by a misquotation of the very words, and surely the tenor of petitioner's brief, in which petitioner is somehow made to say:

> "We, therefore, agree with the appellee's statement on page 6 of her brief that, although the de ndant denied making a pay-off or giving any politic contribution to the sheriff in the sheriff's race that was going on at that time (and nobody gave testimony to the contrary), the jury nevertheless convicted Theriot of making such a pay-off." (See Appendix "A", p. 58).

Diligent readi and rereading of page 6 of our brief fails to disclose any statement conveying such an idea; moreover, convicting the defendant of making a pay-off would avail petitioner nothing in her suit to recover for her husband's death. As the record plainly shows, petitioner's counsel asked defendant's witness, Officer Folse, on cross-

examination, about a pay-off following questions relating to the evidence obtained during the investigation having disappeared. The fact that there had been a pay-off may have provided an explanation for the disappearance of the evidence.

Petitioner's counsel is sharply reprimanded for his opening statement in these words:

> "But this is not all. Recognizing throughout the trial the lack of probative evidence and undertaking to supply it by appeals to passion and prejudice, plaintiff's counsel began the trial with an inflammable opening statement in which, assuming as an established fact, a fact which he neither alleged nor proved, that defendant was a hit and run driver he accused the defendant of being one, and on the basis of this accusation he in effect testified to the jury that it was his conclusion, and that of the officers who would testify for the plaintiff, that Theriot was a hit and run driver."[14]

Petitioner's counsel does not recognize that he felt he was forced to appeal to the passions and prejudices of the jury to prove the case and vigorously objects to such an unfounded conclusion by the Fifth Circuit Court of Appeals. Since an opening statement is designed to apprise the jury of the nature of the case and the facts relied upon to prove it, counsel for petitioner explained the circumstances surrounding the death of Byrd Mercer, frankly admitting that there were no eyewitnesses to the death. Counsel went on to state that he would prove the case against Paris Theriot by means of testimony given by the

[14] Appendix A, p. 58.

police officers who investigated the accident and collected the evidence which mysteriously disappeared before it could be sent to the laboratory for analysis.

As the testimony would show that the decedent had been struck by one in a car who left the scene, the motorist could be rightfully termed a hit and run driver. Counsel stated that the testimony and evidence would show that it was Paris Theriot's car which struck the deceased; therefore, the defendant would be a hit and run driver. We fail to see how such a statement of facts counsel intended to prove could be termed testimony. Certainly the Court of Appeals could not take issue with counsel's concluding that it was Paris Theriot who hit Byrd Mercer, for had he not come to such a conclusion, suit could never have been filed naming Paris Theriot as defendant.

The appellate court then proceeds to censure petitioner's counsel's closing argument thus:

> "In the same inflammatory way and without a single syllable of evidence on which to base it, counsel for appellee, in his argument declaring, 'He had a complete disregard for this man's life', charged in effect that the defendant was a murderer."[15]

Here again, the Fifth Circuit Court of Appeals has assigned error when none has been registered in the District Court; neither has it been argued orally or in brief on appeal.

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[15] Appendix A, p. 59.

That an objection is indispensible except in most extraordinary cases is borne out by the following excerpt from the *Cyclopedia of Federal Procedure*, 3rd Edit., Vol. 13, Sec. 59.41, pp. 374-375:

"59.41 Improper Conduct of Counsel

"Except in rare instances,(74) improper conduct or argument of counsel should be duly objected to.(75) Counsel cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.(76) Counsel must make an objection(77) or move for a mistrial(78) at the time of the alleged misconduct, or where it involves a closing argument, counsel may, and preferably should, make his objection or ask for remedial action at the close thereof and before the case is submitted to the jury(79)."[17]

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[17] Authorities cited in the numbered footnotes are the following:

"[74] Metropolitan Life Ins. Co. v. Banion, 106 F. (2d) 561, appeal dismissed, 309 U. S. 691, 84 L. Ed. 1033, 60 Sup. Ct. 468, wherein it is said, 'However, courts will correct error in rare instances where it appears that the verdict was the result of passion aroused through extreme argument which clearly stirred the resentment and aroused the prejudice of the jury even though no objection was made or exception taken at the time.'

"[75] Hawley v. Hawley, 114 F. (2d) 745; Morgan v. Sun Oil Co., 109 F. (2d) 178, certiorari denied, 310 U. S. 640, 84 L. Ed. 1408, 60 Sup. Ct. 1086. • • •

"[76] United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 84 L. Ed. 1129, 60 Sup. Ct. 811, rehearing denied, 310 U. S. 658, 84 L. Ed. 1421, 60 Sup. Ct. 1091.

"[77] Crumpton v. U. S., 138 U. S. 361, 364, 34 L. Ed. 958, 11 Sup. Ct. 355, 356; Grand Trunk Ry. of Canada v. Blay, 297 Fed. 605; Devine v. Chicago, M. & St. P. Ry. Co., 194 Fed. 861; Cudahy Packing Co. v. Skoumal, 125 Fed. 470. See also Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. Ed. 853, 18 Sup. Ct. 445."

It is submitted that there is no justification for the assignment of error in this regard since no substantial prejudice to defendant resulting therefrom can be shown. Counsel for petitioner's argument was not directed to inflame the jury as the appellate court has held, and this is evident from the following portion of the closing argument, quoted by the Court of Appeals, but ostensibly ignored:

> "* * * 'Not in the form of punishment but as you have the legal responsibility to do, all that you can do within your human limitation, and that is to translate this life, this human being made in God's own image, crushed and killed, translate that life into dollars and cents' * * *"[18]

Surely the jury expected petitioner's counsel to argue his case to the very best of his ability, and with all the conviction at his command in order to obtain recovery for his client. In addition to being unwarranted, the appellate court's rebuke denotes a regrettable lack of confidence in the jury's capacity to understand the role of an attorney,[19] as well as the trial judge's ability to charge the jury so that its understanding of what evidence was to be considered, and what was to be disregarded as mere argument

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"[78] * * *

"[79] McWilliams v. Lewis, 125 F. (2d) 200. See, also chap. 31, ante."

[18] Appendix A, p. 60.

[19] Sheffield v. Vance, infra, at p. 933:

"Federal court jurors, in the care exercised in selection, can not abstractly be said to be of that general caliber."

is assured. And so it was that the able trial judge took pains to charge the jury on this distinction.[20]

The Fifth Circuit Court of Appeals, in *Maryland Casualty Co. v. Reid*, 5th Cir., 1935, 76 F. (2d) 30, at page 34, makes these remarks relative to the function of counsel in pleading his cause:

> "Nor did we mean to say that advocacy may not be legitimately used to arouse sympathy for suffering, and indignation for wrong. Sometime these are of the very essence of the trial. We meant to say, we said, that they could not be illegitimately or falsely used."

The same theory is exemplified in *Sheffield Steel Corp. v. Vance*, 8th Cir., 1956, 236 F. (2d) 928, at page 933:

> "But we will not ordinarily upset a verdict for inadvertent, or provoked, or other zealous argument, which does not impress as having been made in bad faith, unless we have a conviction, from the record as a whole and on the result which was reached, that the jury, must, as a matter of sympathy or

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[20] The trial judge charged the jury as follows:

> "You must distinguish between the mere arguments of Counsel which are made before you, and the evidence upon which those arguments rest. The repetition of an argument, however often, does not constitute evidence. You must carefully analyze assertions which are made to you by either side, and see what basis those assertions have in the evidence. If you will, therefore, not assume anything to be true which has not been proved, and if you will not assume when I ruled out a question that the answer would have been one way or the other, and if you will carefully see to it that all conclusions that you make have some basis in what you have heard here, you will be doing your duty." (R. 279-280).

prejudice, have been materially affected by it, in what it did. Cf. Chicago & N. W. Ry. Co. v. Kelly, 8th Cir., 74 F. (2d) 31, 35."

The Fifth Circuit Court of Appeals, through Judge Hutcheson, has made similar pronouncements in the following cases:

"In Alabama G. S. Ry. Co. v. Carroll, 5th Cir., 84 F. 772, 784, this court early thus stated the general rule with respect to arguments as reversible error: 'We understand the general rule to be that the remarks of counsel to the jury on the merits to constitute reversible error, must be objected to at the time, be unwarranted by the pleadings and evidence, have a tendency to mislead or prejudice the jury, and be to more or less extent approved by the trial judge.' (Emphasis supplied)."

Uhl v. Echols Transfer Co., 5th Cir., 1956, 238 F. (2d) 760, at p. 765.

"While we agree that the argument in some respects exceeded the bounds of propriety, and appellee's counsel should have been restrained from, and rebuked by the judge for, indulging in it, we are of the clear opinion that, **unobjected to, as the most objectionable part of it was, it ought not, upon this record as a whole, be held to be ground for reversal."** (Emphasis supplied).

Fidelity & Casualty of New York v. Williams, 5th Cir., 1952, 198 F. (2d) 128, at p. 129. See Judge Hutcheson's opinion in *Ford v. United Gas Corp.*, 5th Cir., 1958, 254 F. (2d) 817, 818, stating the same rule; that of Judge

Borah, in *Allen v. United States*, 5th Cir., 1951, 192 F. (2d) 570, 571; and that of Judge Brown, in *Williams v. National Surety Corp.*, 5th Cir., 1958, 257 F. (2d) 771, 778. Compare this reluctance to term counsel's argument improper with the extraordinary instances in which such argument was held reversible error.[21]

In consideration of the fact that no objection to petitioner's counsel's opening statement or closing argument was made by defendant at any time during the trial or on appeal, and such statement and argument can by no means be designated inflammatory, prejudicial, or illegitimately used, there can be no error assigned.

II.

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE JURY VERDICT AND JUDGMENT OF THE DISTRICT COURT FOR INSUFFICIENCY OF EVIDENCE.

In holding there was insufficient evidence to sustain the verdict, it is submitted that the Fifth Circuit Court of Appeals erred in (A) refusing to view the evidence in the light most favorable to the petitioner; (B) disregarding the circumstantial evidence adduced, and the probative value thereof; (C) denying the jury the power to draw inferences from the evidence introduced; and (D) usurping the jury's function.

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[21] Robinson v. Pennsylvania R. Co., 3 Cir., 1954, 214 F. (2d) 798, 801, 802; Missouri-K. T. R. Co. of Texas v. Ridgway, 8 Cir., 1951, 191 F. (2d) 363, 369, 370; New York Central R. R. Co. v. Johnson, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 708; Viereck v. United States, 318 U. S. 236, 247, 63 S. Ct. 561, 87 L. Ed. 734; Chicago & N. W. Ry. Co. v. Kelly, 8 Cir., 1938, 94 F. (2d) 569.

A.

The Appellate Court Erred in Refusing to View the Evidence in the Light Most Favorable to the Petitioner.

The actual evidence introduced, and the fact that all of the substances taken from Theriot's car as well as Officer Prudhomme's notes of the investigation mysteriously disappeared; however, the Court of Appeals never once mentions what evidence was presented on behalf of petitioner to prove her case, nor does it note this unexplained disappearance of the evidence. The opinion reflects direct contravention of the long recognized principle articulated in *Royal Indemnity Company v. Curtis*, 5th Cir., 1958, 256 F. (2d) 329, at pp. 330, 331:

> "Appellant urges upon us that there was no evidence that appellee was totally disabled for any period of time after August 1, 1955. * * * It is sufficient to say that we will not disturb a jury's verdict if, as here, **the evidence viewed from the standpoint of the successful party is sufficient to sustain the verdict,** or if reasonable minds could differ as to the weight and probative force of the evidence." (Emphasis supplied).

Likewise in *Railway Express Agency v. Epperson*, 8th Cir., 1957, 240 F. (2d) 189, at p. 193, is a similar holding:

> "It must be kept in mind that in reviewing the adequacy of the evidence to sustain the verdict for the plaintiff, he is entitled to the benefit of every rea-

sonable inference which can be drawn from the evidence viewed in the aspect most favorable to him, See Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; Svenson v. Mutual Insurance Co. of N. Y., 8th Cir., 87 F. (2d) 441, 442; Elzig v. Gudwanger, 8th Cir., 91 F. (2d) 434, 439."

See also:

Milnow v. New York Central Railroad, 7th Cir., 1957, 248 F. (2d) 52;

Continental Can Co. v. Horton, 8th Cir., 1957, 250 F. (2d) 637;

Lukon v. Pennsylvania R. Co., 3rd Cir., 1942, 131 F. (2d) 327;

Railway Express Agency v. Mackay, 8th Cir., 1950, 181 F. (2d) 257;

Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492;

Ezee Stonecutter Mfg. Co. v. Southwest Indus. Prod., 8th Cir., 1959, 262 F. (2d) 183.

B.

The Court of Appeals Erred in Disregarding the Circumstantial Evidence Adduced by Petitioner and the Probative Effect Thereof.

Certain very important pieces of circumstantial evidence were presented at the trial by petitioner, which the Fifth Circuit Court of Appeals chose to ignore, although they were validly considered by the jury in arriving at its verdict; and which showed defendant's connection with and responsibility for, the death of Byrd Mercer; that defend-

ant left Fisherman's Bar, in Grand Isle, proceeding east on Highway 1, passing the spot where Mercer was killed and his body found, at approximately the same moment Mercer's death occurred; the investigating officers discovered that Theriot's car had an indentation in the hood for which defendant gave two conflicting explanations; the automobile had a blue stain resembling a mark made by dye, as well as being covered with a film of white powdery substance, although defendant denied having washed his car that morning, and the previous evening had been rainy; a hair-like substance was found underneath the car on the right front axle, and a towel with brownish stains appearing to be blood was found inside the defendant's car. The pictures taken by Deputy Sheriff Gautreaux showed that the indentation on Theriot's car was made by a soft object; that there were tracks of an automobile leading up to Mercer's body and beyond it; these marks indicated Mercer was struck while on the shoulder of the highway; blood was found in the tire tracks. Despite all of this evidence, the Fifth Circuit Court of Appeals held that the case should not have been submitted to the jury. (Appendix "A", p. 64).

In opposition to the Fifth Circuit Court of Appeals' opinion on this point, the following cases voice approval of circumstantial evidence:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence."
>
> *The Robert Edwards*, 6 Wheat. 187, 190.

> "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral

coincidences, be sufficient to constitute conclusive proof."

Coggeshall v. The United States, 69 U. S. 383, 2 Wall. 383, 17 L. Ed. 911, 914, affirmed C. C. Fed. Cas. No. 16,144, 2 Cliff. 57.

"As to evidence that music originated from the Muse-Art studio, and not from some other mechanical source, it is circumstantial in part. Circumstantial evidence, however, is not necessarily of less probative value than direct—and may well be of more. In re Young's Estate, 1943, 347 P. 457, 32 A. (2d) 901, 154 A. L. R. 643; Lukon v. Pennsylvania R. Co., 3rd Cir., 1942, 31 F. (2d) 327, 329. See U. S. v. Allard, 3rd Cir., 1957, 240 F. (2d) 840."

See also:

Holmes v. Goldsmith, 147 U. S. 150, 3 S. Ct. 288, 37 L. Ed. 118;

Brig Struggle v. The United States, 13 U. S. 71, 9 Cranch. 71, 3 L. Ed. 660;

Rogers v. Missouri Pac. R. R. Co., 1956, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. (2d) 493, rehearing denied, 352 U. S. 521, 77 S. Ct. 459, 1 L. Ed. (2d) 515.

Relative to the amount of circumstantial evidence needed to permit the case to go to the jury are the following cases:

"As pointed out above, it is not necessary that circumstantial evidence be conclusive in order to take a case to the jury."

Sitta v. American Steel and Wire Div. of U. S. Steel Corp., 6th Cir., 1958, 254 F. (2d) 12, at p. 16.

"It is true that direct evidence does not show who gave the order to turn out the lights or who extinguished them, but the case is not devoid of evidence from which inferences unfavorable to the Government might have been drawn in this connection."

Korel v. U. S., 4th Cir., 1957, 246 F. (2d) 425, at p. 425.

"The crucial question, then is whether the jury could properly find that Williams died as a result of defendant's negligence. On this score, the learned trial judge held that, lacking evidence to show that Williams left the train when it stopped at the Race Street tower, there was a fatal gap in the plaintiff's case which could not be filled by the presumption of due care. Nevertheless, we are of the opinion that the issue was one to be resolved by the trier of fact. Van Tine v. Cornelius, 1947, 355 Pa. 584, 587, 50 A. (2d) 299."

"Since there was no evidence that Williams was seen leaving the train, it is patent that the plaintiff's case rests on circumstantial evidence."

Williams v. Reading Co., 3rd. Cir., 1949, 175 F. (2d) 32, at p. 34.

In instances such as the case at bar, where there are no eyewitnesses to the accident, reliance must be placed on circumstantial evidence, the jurisprudence has

established the principle that negligence and causation could be proved by circumstantial evidence:

Pruitt v. Hardware Dealers Mut. Fire Ins., 5th Cir., 112 F. (2d) 140;

National Biscuit Co. v. Lizzky, 6th Cir., 1927, 22 F. (2d) 939;

Sears Roebuck v. Peterson, 8th Cir., 76 F. (2d) 243;

Penn. Co. v. Zahner Metal Sash & Door Co., 6th Cir., 1921, 273 F. 993;

Highway Const. Co. v. Shue, Okl., 49 P. (2d) 203;

City of Bessemer v. Clowdus, 261 Ala. 388, 74 So. (2d) 259.

In *Pritchard v. Nelson*, 2nd Cir., 1955, 228 F. (2d) 878, at page 880, an application of this rule is stated:

> "But in the case at bar the jury could have inferred from the position in which plaintiff's body was found lying on the highway that she had not crossed the center line at the time of the accident and that defendant was driving in the wrong lane. The jury could also have found from the direction in which plaintiff was facing and from the other attendant circumstances that she had been watching cars approaching from the west; and that in effect she was hit from behind."

Likewise in the instant case, the photographs depicting the position of the body and the tire tracks gave the jury ample evidence upon which to base their conclusion that the deceased was struck by a vehicle which veered off the road onto the shoulder where Mercer was walking, showing negligence on the part of the driver.

The case of *Schultz v. Pennsylvania Railroad Company*, 1956, 350 U. S. 523, 76 S. Ct. 608, was another example of negligence and causation being proved by circumstantial evidence involved a suit by the widow of a tug fireman employed by the defendant railroad who was last seen at 1:25 A. M. walking in the direction of a tug. The deceased alone, had to take care of four tugs, and had to step from one boat to another with no illumination except his flashlight. Several weeks later his body was discovered in the water near an adjacent pier; he had drowned, and there were no eyewitnesses. The District Judge directed the jury to return a verdict for the defendant, stating, "there is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two". The Fifth Circuit Court of Appeals affirmed, saying that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty" it failed to show "where the accident occurred" or "that it was proximately caused by any default on the part of the defendant". The Supreme Court, reversing the Court of Appeals and the District Court, held:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that **negligence cannot be established by direct precise evidence such as can be used to show that a piece of ground is or is not an acre.**
>
> * * * * * *
>
> "Fair minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And **reasonable men could also**

find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties."

Schulz v. Pennsylvania Railroad Company, supra, p. 610.[22]

Petitioner submits her case is controlled by the decisions cited above, and especially, the *Schulz* case, and the Fifth Circuit Court of Appeals' failure to give any weight to circumstantial evidence presented herein was contrary to these decisions and hence constituted error.

C.

The Fifth Circuit Court of Appeals Erred in Denying the Jury the Power to Draw Inferences from the Evidence Introduced.

In addition to ignoring the circumstantial evidence introduced on behalf of petitioner, the appellate court negated the jury's power to draw inferences from the evidence, in contravention of numerous decisions, such as the landmark cases of *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 749, 744, 90 L. Ed. 916, and *Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409*, in which this Honorable Court gave special consideration of this jury function in these words:

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a con-

[22] A recent case closely similar on its facts is **Butler v. Whiteman**, 386 U. S. 271, 78 S. Ct. 734.

trary inference or feel that another conclusion is more reasonable."

Lavender v. Kurn, supra, p. 653.

"It is not the function of a court to search the record for conflicting circumstantial evidences in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U. S. 68, 63 S. Ct. 451, 143 A. L. R. 967; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. **That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.**

"Upon an examination of the record we cannot say that the inferences drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. **Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.** No reason is apparent why we should abdicate our duty to protect and guard that right in this case. * * *" (Emphasis supplied).

Tennant v. Peoria & P. U. Ry Co., supra, p. 35.

The principles embodied in the *Lavender v. Kurn* and *Tennant v. Peoria* cases have been followed by all of the Circuit Courts of Appeals, including the Fifth Circuit. A few of the almost countless decisions are these:

Greyhound Corporation v. Mrs. Elizabeth Dewey, 5 Cir., (1957), 240 F. (2d) 899;

Watn v. Pennsylvania R. R. Co., 3 Cir., (1958), 255 F. (2d) 854;

Jencks v. United States, 5 Cir., (1955), 226 F. (2d) 540;

Roundtree v. Post, 5 Cir., (1943), 134 F. (2d) 340;

Maryland Casualty Company v. Kador, 5 Cir., (1955), 225 F. (2d) 120;

Nelson v. Brames, 10 Cir., (1958), 253 F. (2d) 882;

Kingston v. McGrath, 9 Cir., (1956), 232 F. (2d) 495;

Gibson v. Elgin, Joliet & Eastern Ry. Co., 7 Cir., (1957), 246 F. (2d) 384.

Judge Brown, in *Williams v. National Surety Corporation*, 5 Cir., (1958), 257 F. (2d) 771, discusses the operation of the rule thus established in conjunction with the appellate court's duty to examine the sufficiency of evidence to sustain the verdict:

> "A hard thing for any loser to accept is that we do not sit to review the facts nor * * * are we to sift, weigh, accept and reject, each piece of evidence either separately or as it fits into the mosaic pattern, to determine what conclusion out of the mass of affirmations and denials, was the truth. **That was for the jury provided only that first, the evidence had that minimal quality required to allow conflicting inferences,** and second that the cause was not, over timely objection submitted in disregard of accepted standards." (Emphasis supplied).
>
> *Williams v. National Surety Corporation, supra*, at p. 773.

Since it is beyond dispute that the evidence introduced had that "minimal quality to allow conflicting inferences", petitioner maintains that the Court of Appeals was unjustified in its holding that the jury should not be permitted to make inferences from the evidence because there was no issue worthy of submission to the jury, as well as in its declaration that the Fifth Circuit Court of Appeals would not follow federal court decisions such as *Watn v. Pa. Ry. Co.*, 255 F. (2d) 854, in which the jury's power to return a verdict based on conjecture and speculation is approved. This being the holding in *Webb v. Illinois Central R.R. Co.*, (1957), 352 U. S.

612, 77 S. Ct. 451, it may be assumed the Fifth Circuit has chosen to disregard this Honorable Court's decisions also.[23]

D.

The Fifth Circuit Court of Appeals Usurped the Jury's Function of Weighing the Evidence and Credibility of Witnesses, in Derogation of Its Function as an Appellate Court.

Commenting upon the jury's province, Mr. Justice Douglas, in *Ellis v. Union Pacific R. Co.*, (1947), 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 57, cites *Lavendar v. Kurn* and continues thus:

> "And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury • • •."
>
> *Ellis v. Union Pacific R. Co., supra*, 67 S. Ct. p. 600.

Other cases which have denied the appellate court the right to re-weigh the facts found by the jury and the credibility of the witnesses produced are these:

Readnour v. Commercial Standard Insurance Company, 10th Cir., (1958), 253 F. (2d) 907;

General Accident Fire & Life Assurance Corp. v. Zapel, 5th Cir., (1956), 231 F. (2d) 917, 921;

Lowry v. Seaboard Airline Railroad Co., 5th Cir., (1948), 171 F. (2d) 625, 630;

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[23] Appendix A, p. 62.

Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. Ed. 485;
Western Production Company v. Yarbrough, 5th Cir., (1956), 234 F. (2d) 889;
E. N. Bisso & Son v. Miller, 5th Cir., (1956), 233 F. (2d) 855, 857;
Roucher v. Traders & General Insurance Company, 5th Cir., (1956), 235 F. (2d) 423;
Senko v. LaCrosse Dredging Corp., (1956), 352 U. S. 370, 77 S. Ct. 415, 1 L. Ed. (2d) 404, rehearing denied, 353 U. S. 931, 77 S. Ct. 416, 1 L. Ed. (2d) 724;
Collins v. Neal, 7th Cir., (1955), 219 F. (2d) 238, 241;
Dowell, Inc., v. Jowers, 5th Cir., (1950), 182 F. (2d) 576, 579;
City of Knoxville, Tenn., v. Bailey, 6th Cir., (1955), 222 F. (2d) 520, 524.

By substituting its own judgment for that of the jury, the Fifth Circuit Court of Appeals has set at naught the guarantees of the Seventh Amendment to the Constitution to a jury trial.[24] The appellate court's antagonism to the jury's power to find facts and pass on the credibility of witnesses is displayed in the opinion, note 5, (Appendix "A", pp. 64-65) in which reference is made to the dissent of the activists in *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077, written by Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Murphy concurred dissenting. For our part, we find this dissent to

[24] See quoted portion of Tennant v. Peoria & P. U. Ry. Co., supra.

be a splendid treatment of the import and implementation of the Seventh Amendment, from which we quote:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or jury must decide facts and to the extent we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. * * * I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."
>
> *Galloway v. United States, supra*, 63 S. Ct., at pp. 1095-1096.

That this struggle continues is shown by the dissent of Judge Clark, Chief Judge of the Second Circuit Court of Appeals, in the case of *Filipek v. Moore-McCormack Lines*, 2nd Cir., 1958, 258 F. (2d) 734:

> "I shall not repeat at length the concern I have previously voiced at what seems to me a growing judicial tendency to invade the province of the jury. See Palermo v. Luckenbach S. S. Co., 2nd Cir., 246 F. (2d) 557, 561-563, reversed 355 U. S. 20, 78 S. Ct. 1, 2 L. Ed. 3, with the verdict eventually reinstated, 2nd Cir., 253 F. (2d) 724; Kermarec v.

Compagnie Generale Transatlantique, 2nd Cir., 245 F. (2d) 175, 183, certiorari granted, 355 U. S. 902, 78 S. Ct. 335, 2 L. Ed. (2d) 259. But the vast number of cases where the Supreme Court had to intervene to restore verdicts judicially scuttled should be recalled * * *"[25]

Filipek v. Moore-McCormack Lines, supra, at pp. 738, 739.

The case at bar is but one more indication of the federal appellate courts tendency to assume the jury's role deplored by Mr. Justice Douglas and Chief Judge Clark, in which the Court of Appeals has arbitrarily canceled the

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[25] "See Palermo v. Luckenbach S.S. Co., supra, 355 U. S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3; Honeycutt v. Wabash Ry. Co., 355 U. S. 424, 78 S. Ct. 393, 2 L. Ed. 2d 380; Stinson v. Atlantic Coast Line R. Co., 355 U. S. 62, 78 S. Ct. 136, 2 L. Ed. 93; Gibson v. Thompson, 355 U. S. 18, 78 S. Ct. 2, 2 L. Ed. 2d 1; Ringhiser v. Chesapeake & Ohio Ry. Co., 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268; McBride v. Toledo Terminal R. Co., 354 U. S. 517, 77 S. Ct. 678, 1 L. Ed. 2d 1534; Thomson v. Texas & Pac. Ry. Co., 353 U. S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722; Deen v. Gulf, Colorado & Santa Fe Ry. Co., 353 U. S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 771; Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 682, 1 L. Ed. 2d 718; Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 680, 1 L. Ed. 2d 716; Arnold v. Panhandle & Santa Fe Ry. Co., 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889; Rogers v. Missouri Pac. R.R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; Webb v. Illinois Cent. R. Co., 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503; Herdman v. Pennsylvania R. Co., 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508; Ferguson v. Moore-McCormack Lines, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 515; Cahill v. New York, N. H., & H. R. Co., 350 U. S. 898, 76 S. Ct. 180, 100 L. Ed. 790; Strickland v. Seaboard Air Line R. Co., 350 U. S. 893, 76 S. Ct. 60, 100 L. Ed. 725; O'Neill v. Baltimore & Ohio R. Co., 348 U. S. 956, 75 S. Ct. 447, 99 L. Ed. 747; Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. 740; Stone v. New York, Chicago & St. Louis R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

result of the trial below since they were not in conformity with its view of the case.

CONCLUSION.

This court should determine whether a Circuit Court of Appeals should set aside the verdict of a jury by finding facts that are less favorable to petitioner than those found by the jury on the evidence in this case where its action contravened the Seventh Amendment.

This court should determine whether the decision of the court below, which is at variance with that of other circuit courts of appeal, constituted such a departure from such decisions as to warrant this court taking jurisdiction.

The court below has so far departed from the accepted and usual course of judicial proceedings as to require this court, in the exercise of its power of supervision, to grant a review in this case; and has decided a federal question in a way probably in conflict with applicable decisions of this court.

WHEREFORE, the premises considered, the petitioner asks this Honorable Court to grant this petition.

Respectfully submitted,

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PROOF OF SERVICE.

I, Warren E. Miller, attorney for petitioner, and member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Robert G. Hughes, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to his office at 1702 American Bank Building, New Orleans 12, Louisiana.

Dated this 18th day of March, 1959.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS.
FOR THE FIFTH CIRCUIT

No. 17, 214

PARIS THERIOT,

Appellant,

versus

MRS. WANDA MERCER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 23, 1959).

Before HUTCHESON, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: Appealing from a judgment on a verdict in a suit for damages for the death of plaintiff's husband, defendant is here confidently insisting that, for the reasons put forward by him in his

brief,[1] the court erred in denying his motion for an instructed verdict made at the close of plaintiff's case and repeated at the close of the evidence.

In the alternative he urges upon us that, in the conduct of the case, errors of omission and commission occurred which, permitting the case to go out of bounds, require reversal. Upon the considerations and for the reasons hereafter stated, we find ourselves in substantial agreement with these views.

In *Maryland Cas. Co. v. Reid*, 76 F. (2d) 30, this court, as a preliminary to disposing of the question for decision there, whether the trial had been attended with reversible error, carefully examined and as carefully showed forth the intensely dramatic nature and atmosphere of a jury trial and how it affects the actors in it, the witnesses, the lawyers, the litigants, the triers themselves—judge

[1] These are in substance:

Evidence was not offered to prove that decedent received the injuries from which he died as a result of being struck by defendant's automobile.

Neither the time nor the place decedent sustained the injuries was shown.

The only pertinent fact in evidence was that decedent's body was found alongside the road on the day following the time when defendant's vehicle and other vehicles passed the place where he was later found, and the evidence was insufficient to warrant submission of the case to the jury.

No evidence was offered of negligence of defendant.

The burden of proof is on plaintiff to prove negligence, not on defendant to disprove it.

"'The judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility.' Patton v. Texas & P. Ry. Co., 179 U. S. 661, 21 S. Ct. 275, 276, 45 L. Ed. 361.

and jury. Pointing out that many verdicts in closely contested civil and criminal cases find their real spring in the atmosphere generated in and by the trial, where things felt but unseen, sometimes real, sometimes illusory, arising out of but more than the relevant and admissible evidence, in the end more influence the verdict than the relevant testimony itself does, the opinion, declaring that in a federal court, in a jury trial, it is the judge who is charged with full responsibility for its just outcome, then went on to say:

> "* * * Because these things are so of jury trials, it is of the genius of our institutions that they be conducted under the firm and steady guidance of judges as administrators, who, having minds trained and personalities adequate to the task, are held primarily responsible for their just outcome.[2] Because these things are so, in a federal court at least, the conduct of jury trials is largely confided to the district judge, who is expected to have and exercise trial skill of the highest order, and a wise and just discretion. *His chief function, his primary object, is to keep the case within legal bounds by admonitions and rulings from its beginning to its end. He uses the rules of evidence as means, not ends, to elicit, and confine the case to, the best evidence available in order to bring the truth to light. Trained in the principles and problems of proof, knowing how to value the pertinent, to reject the impertinent, he uses other trial rules to accomplish the same end. Nor does his function as an overseer, superintendent, and administrator of the trial end with its ending.*

"At common law and by statute, the federal district judge is charged with the duty of granting a new trial in a jury case where, in his opinion, it went unjustly and injuriously out of bounds. This court, as to law cases, is a court of errors. We do not retry the case. We review the record made in it for reversible error, error by the judge, in conducting or failing to conduct the trial, which has, by permitting the case to get out of bounds, prejudiced the just result. * * *"

"*Ordinarily*, if his counsel fails to adequately object, or fails to except to adverse action on his objection, a litigant may not complain of what occurred as error, for he will be treated as having assented to it. *On the other hand, a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, though no objection is made and no exception taken, correct an error of abdication, which has resulted unjustly, by voiding the trial.* But this will be done only in extreme cases, where the judge's error in permitting the trial to get out of bounds, instead of exercising his function to guide and control it, *is of such transcendent influence on the course of the trial as that, though not excepted to, justice requires its being* noticed and corrected. * * *" pp. 32-33. (Emphasis supplied).

This case at once precisely illustrates and perfectly proves the truth and wisdom of what was there said. Originating in and bolstered by an atmosphere of rumor

and intrigue, heard on inadmissible and inflammatory evidence and presented to the jury with the use of trial tactics equally inadmissible and inflammatory, which except in one glaring instance[2] went unrebuked and unrestrained, the case was tried in a melodramatic atmosphere and setting of suspicion and prejudice in and by which trifles light as air were made to seem confirmations strong as proofs of Holy Writ. Thus tried, it was submitted to the jury on a record so replete with instances of things done which ought not to have been done and of things left undone which ought to have been done as to require the holding here that defendant was deprived thereby of that fair trial to which, in a federal court at least, every person accused of fault is by law entitled.

The appellant, citing many instances in point, does indeed on page 11 of his brief courteously acknowledge "that the trial court attempted to protect defendant from speculative inadmissible and improper conclusions and opinions, but sufficient inadmissible evidence went into the record, and the damage was done with the jury". He, however, fails to point out many other instances of even greater moment where, due to the inaction of the trial judge, the trial went completely out of bounds as a trial to become a hue and cry. Without undertaking to point them all out, it is sufficient to say that one of the most grievous of them was the court's permitting

[2] This was a proffer by plaintiff of proof that many years before Theriot had been involved in two fatal accidents, having no connection with or relation to the one charged here, which was met by the statement of the court that such proof was inadmissible and that if it came in from any witness in any way the court would immediately order a mistrial.

a witness to be asked whether there had been a pay-off in the case and to answer that he had heard that there was. From then on, it is quite clear that the trial took on its cloak and dagger aspect of political intrigue and „scandal„ and the real issue, whether the defendant's car had struck the deceased and whether, if so, the defendant was negligent, was lost to view, indeed disappeared from the case.

We, therefore, agree with the appellee's statement on page 6 of her brief that, although the defendant denied making a pay-off or giving any political contribution to the sheriff in the sheriff's race that was going on at that time (and nobody gave testimony to the contrary), the jury nevertheless convicted Theriot of making such a pay-off. Indeed it was the admission of this wholly inadmissible and highly prejudicial hearsay testimony, the introduction of which should have caused a mistrial, which changed the case from a suit for damages into an inquisition into fraud and wrong doing in the sheriff's office, a matter which, in the state of the evidence, had nothing to do with the case and could have had no affect on it except the unlawful one of depriving the defendant of a fair trial on the charge of negligence made but not proven.

But this is not all. Recognizing throughout the trial the lack of probative evidence and undertaking to supply it by appeals to passion and prejudice, plaintiff's counsel began the trial with an inflammable opening statement in which, assuming as an established fact, a fact which he neither alleged nor proved, that defendant was a hit and run driver, he accused the defendant of being one, and

on the basis of this accusation he in effect testified to the jury that it *was his conclusion, and that of the officers who would testify for the plaintiff, that Theriot was a hit and run driver.*[3]

In the same inflammatory way and without a single syllable of evidence on which to base it, counsel for appellee, in his argument, declaring "He had a complete disregard for this man's life", charged in effect that the defendant was a murderer. Equally inadmissible and inexcusable was his appeal to the passions of the jury, that it should not hesitate to find defendant guilty of negligence since defendant had a policy to pay the liability for him, while in the same breath he told the jury, though all the testimony was to the contrary, that defendant sold his business to his brother to escape liability and this was an admission of his guilt. Finally, he concluded with this impassioned appeal to prejudice against the defendant and sympathy for the plaintiff:

> "So, it is in your hands. You now have the responsibility, and with all the sincerity of my command I implore, I beg you to render justice in this

[3] "This is a rather bizarre case. The plaintiff is in the position of not having any eye witnesses to bring here to this court to testify as to what happened. **The only eye witness to this tragedy was the hit and run driver, and I know of no act that man commits upon man more despicable and cowardly than the hit and run driver.** * * * So I say to you ladies and gentlemen of the jury, that this case will present a mystery, if you consider the lack of an eye witness to the very instant of Byrd Mercer being struck from behind, as he was walking along the highway. **But, after hearing all the evidence and these officers, and these witnesses as to what were the circumstances surrounding this occurrence and this tragedy, we feel confident that you will come to the same conclusion that we have, and that the officers have, and that is that Paris Theriot was a hit-and-run driver.**" (Emphasis supplied).

case: Not in the form of punishment but as you have the legal responsibility to do all that you can do within your human limitation, and that is to translate this life, this human being made in God's own image, crushed, killed, translate that life into dollars and cents. * * *"

To cap it all, there was the further and highly prejudicial error of charging the jury as follows:

> "The testimony of all of the witnesses for the plaintiff has made out what we call in law a circumstantial case, and you will consider the evidence in the light of these circumstances as they have been adduced from the witness stand."

Though exception was taken to the charge and immediately called to the court's attention, the district judge, saying, "If that was included in the charge it certainly was not my intention", called for the stenographer's notes and did not make the correction until after the jury had been out more than thirty minutes deliberating under a charge which had advised them that the plaintiff had made out her case and the jury must consider their verdict in the light of the circumstances detailed by her, rather than in the light of the testimony as a whole, the direct testimony of defendant and his witnesses.

In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominating the trial, deprived the defendant of his day in

court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption.

There remains only the determination whether, with the record stripped of all its erroneous and prejudicial occurrences, the admissible and relevant evidence in the case was sufficient to support a verdict and whether, if not, the case should nevertheless be remanded for a new trial in accordance with law.

On the first phase of this inquiry, appellant, pointing to the complete absence of any evidence, circumstantial or otherwise, that Theriot's car struck the deceased or that Theriot was in anywise negligent, and to the uncontradicted direct evidence of defendant's witnesses to the contrary, and relying upon *Benton v. Blair*, 228 F. (2d) 55; *Deitz v. Greyhound*, 234 F. 327, and the many cases from this circuit to the same effect cited therein, insists that a directed verdict was demanded. Further urging upon us that for the jury to find liability under the evidence in this case would be pure speculation, defendant, quoting from *More v. Chesapeake & Ohio R. Co.*, 340 U. S. at 578: "This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway v. United States*, 319 U. S. 372, 395", and citing and quoting from a number of the cases, many from this court, which have so held, confidently asserts that there is no doubt that a verdict in his favor should have been directed. Cf. *Smith v. General Motors*, 227 F. (2d) 210, and *McNamara v. American*, 247 F. (2d) 445, both circumstantial evidence cases.

On her part, appellee, not taking serious issue with the appellant's statement of the governing rule, that trial

by jury means trial by judge and jury, except to the extent that the quotation from *Watson v. Pa. Ry. Co.*, 255 F. (2d) 854,[4] an F.E.L.A. case, that a verdict in the federal court may rest on conjecture and speculation, may be regarded as doing so, and relying on cases in which, upon their particular facts, this court and other courts have held that there was sufficient evidence under the laws of right reason to take the case to the jury, insists that a jury case was made out and the motion for a jury verdict was properly denied. In further support of this view, appellee quotes from the order of the trial court, denying motion for judgment and alternatively for a new trial:

> "REASONS. No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to."

Unfortunately for appellee's reliance thereon, the statement proves too little or too much. If, as appellee seems to think, the judge was giving as his reason for denying the motion that he thought there was sufficient evidence to support the verdict of the jury for plaintiff, it would add to the case nothing more than appears in every case where the judge denies such a motion, that the district judge held a different view from that of the movant. This

[4] With respect to which, saying only, "Not in the Fifth Circuit while this court sits", we cite Milom v. N. Y. Central RR. Co., 248 F. (2d) 52 (7 Cir.) and Gibson v. E. J. Ry. Co., 246 F. (2d) 834 (7 Cir.), opinion on rehearing; and the Memorandum of Mr. Justice Frankfurter, in which Mr. Justice Harlan joins, on denial of certiorari in that case:

> "* * * Not until this court explicity holds that 'in F.E.L.A. cases, speculation, conjecture and possibilities suffice to support a jury verdict', which is the holding of the Court of Appeals in this case, 246 F. (2d) 834, 837, is that to be assumed to be the law of this court." 355 U. S. 897.

is not, however, what the district judge said. What he said was the same thing that the appellant is saying, that there was no issue for the jury, that the evidence demanded a verdict by instruction, not indeed, as appellant insists, for the defendant but one for the plaintiff. If the judge really meant this, of course he should not have submitted the issue of liability of the defendant but should have instructed a verdict for her thereon.

We do not believe that anyone could reasonably contend or that the district judge thought, that a verdict for plaintiff was, as matter of law, demanded. Indeed we believe he meant to say, and we agree with him in saying it, that in the atmosphere generated in and by the trial, no other verdict could reasonably have been expected from the jury. But, as already stated, this is not a valid consideration, and we agree with appellant that a verdict for him was demanded.

Of the cases cited by appellee in her supplemental brief, it is sufficient to say that these, like all the cases cited by both sides to the point under discussion, are fact cases and in each the facts must be looked to to determine for that court the correctness of its decision, whether in the particular case there was or was not a fact issue for the jury. It should be noted, however, as to the cases appellee cites from New York, as is pointed out in *Noseworthy v. City of New York*, 80 N. E. (2d) 744, on the authority of which these cases were decided, it was held that since the passage of the decedent estate law of New York, Consolidated Laws, Sec. 131, in a death case a plaintiff is not held to as high a degree of proof of the cause of the action as where an injured

plaintiff himself describes the occurrence, and, further, in *Wieland v. Third Ave.*, 61 N. Y. Supp. (2) 359, affirmed 296 N. Y. 1047, 73 N. E. (2d) 914, it was held that in the absence of proof of an actual collision, there is no basis for the finding of negligence. It should be noted, too, that in the cases on which appellant relies, the immediacy of the discovery of the injury and the fact that there was no evidence of any other person, motor vehicle or object which in the brief moment of time when the accident occurred could have influenced the result, were the deciding factors. See also *Wank v. Ambrosna*, 307 New York 321, 121 N. E. (2d) 246, in which the court held that proof sufficient to support an inference that a person was struck by a car was not, even in a death case, sufficient to support a finding of negligence.

This is not to say that some of the cases cited by appellant and some cited by appellee, if viewed as stating principles of law, could not be regarded as favorable to those who cite them. Considered, as they must be, however, as merely the application of legal principles to the facts of the particular case, they cannot be accepted as contrary to our conclusion here, that the evidence offered on this trial was not sufficient to take the case to the jury.[5]

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[5] In view of the approach to the law of the case taken by both parties as to the function of judge and jury in a jury tried case, it will not be necessary for us to enter here upon a philosophical discussion of the struggle, beginning with the dissent of the activists in the Galloway case, supra, to change the ancient landmarks so that a trial by jury in the federal court will no longer be a trial by judge and jury, with the judge responsible for the just outcome of the trial, but a trial by the jury alone with the judge as a spectator or, at best, a figurehead. We think, however, we should say that in the controversy thus launched and still continuing, we stand firm against the judicial activism back of the

Because, however, evidence, as distinguished from rumor and speculation, as to the why and how of the death of plaintiff's decedent and as to the responsibility of defendant for it, may have been or may be discovered, we order the judgment reversed and the cause remanded with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial.

REVERSED and REMANDED with directions.

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struggle and the results it seeks to achieve, and, regarding as we do the guarantees of the Seventh Amendment, as applicable to plaintiff and defendant alike, we cannot understand how protagonists for the change can look upon the amendment, as apparently they do, as intended for the benefit of plaintiffs alone and, so regarding it, as the dissenters in the Galloway case apparently did, advocate doing away with or limiting, beyond the ancient use, the control and guidance of the trial by an informed and experienced judge.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1958

No. 17,214

D. C. Docket No. 6072 Civil

PARIS THERIOT,

Appellant,

versus

MRS. WANDA MERCER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before Hutcheson, Chief Judge, and Cameron and Wisdom, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the District Judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial;

It is further ordered and adjudged that the appellee Mrs. Wanda Mercer, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 23, 1959.

Issued: